No. 48850-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LEONEL GONZALEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Leonel Gonzalez's conviction for tampering with a witness violated his right to due process, guaranteed by the Fourteenth Amendment and article I, section 3, because the evidence was insufficient to allow any rational trier of fact to find the elements beyond a reasonable doubt.

2. In violation of due process and the right to a jury trial, as guaranteed by the Sixth and Fourteenth Amendments and article I, sections 3, 21, and 22, the to-convict instruction for possession of a controlled substance omitted the essential element that the substance possessed was methamphetamine.

3. In violation of the right to a jury trial, as guaranteed by article I, sections 21 and 22, the court exceeded its authority by sentencing Mr. Gonzalez for possession of methamphetamine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove each element of an offense beyond a reasonable doubt. If a rational trier of fact could not find all of the elements of the crime charged beyond a reasonable doubt the evidence is insufficient. An individual commits the crime of

tampering with a witness when he attempts to induce the witness to "testify falsely." Was there insufficient evidence to support Mr. Gonzalez's conviction for tampering with a witness when his statements did not address the witness's testimony at trial and the evidence did not show he was requesting the witness say anything other than the truth?

2. The to-convict instruction must include all essential elements of the crime charged. The identity of a controlled substance is an essential element of the offense where it increases the maximum sentence. A finding that the defendant possessed methamphetamine raised the offense to a felony and increased the maximum sentence permitted by statute. Did the trial court err in failing to instruct the jury that it had to find the substance possessed was methamphetamine?

3. Under the federal constitution, the omission of an essential element from the jury instructions may be harmless error. The right to a jury trial under the Washington constitution, however, is "inviolate" and has been construed to be more protective than under the federal constitution. Historically, the omission of an element from the jury instructions always required reversal because the jury did not make a necessary finding. Other states have interpreted their state constitutions

as requiring automatic reversal when an element is omitted from the jury instructions. Under the Washington Constitution, does omission of an element in the jury instructions always require reversal?

4. A sentencing court exceeds its authority when it imposes a sentence not authorized by the jury's findings. This error is never harmless under the Washington Constitution. A defendant's sentence is increased if the jury finds the defendant possessed methamphetamine, as opposed to any controlled substance. Here, the jury only found the defendant possessed a controlled substance. Did the trial court exceed its authority by imposing a felony sentence for the possession of methamphetamine when the jury did not make this finding?

C. STATEMENT OF THE CASE

Leonel Gonzalez and Nona Hook have been in a relationship for nine years. RP 179. At the time of the incident, Ms. Hook and her son lived in the home of Ms. Hook's mother with other members of their family. RP 178. Mr. Gonzalez came in and out of the home, consistently spending the night but not actually living with the family. RP 156, 179-80.

Ms. Hook's mother owned a Jeep, which she only permitted Ms. Hook to drive. RP 154-55. Ms. Hook's mother had previously granted Mr. Gonzalez permission to drive her car as well, but after Mr. Gonzalez crashed the car, she denied Mr. Gonzalez's requests to drive her Jeep. RP 157-58.

One evening, Ms. Hook and Mr. Gonzalez were driving in the mother's Jeep when they got into an argument. RP 181. Mr. Gonzalez tossed a phone at Ms. Hook and it struck Ms. Hook's face. RP 182. Ms. Hook pulled the Jeep over and hit Mr. Gonzalez in retaliation. RP 184. They continued to argue and Ms. Hook eventually dropped Mr. Gonzalez off at a gas station. RP 186.

The next morning, Ms. Hook woke up to Mr. Gonzalez in her bedroom asking if she wanted coffee. RP 189. She yelled at him, went back to sleep, and he left. RP 189. Later that morning, she woke to her mother screaming that her Jeep was missing. RP 190.

Mr. Gonzalez returned with the Jeep three days later. RP 193. As Mr. Gonzalez pulled into the alley behind the home, police officers were waiting. RP 195-96. Mr. Gonzalez kept driving, then exited the vehicle while the car was still rolling. RP 249-50. The Jeep rolled into a parked vehicle. RP 250.

When Mr. Gonzalez was placed under arrest, the officer discovered a white substance, which later tested positive for methamphetamine and cocaine, in his right back pocket. RP 242-43, 286. At the jail, Mr. Gonzalez called Ms. Hook, explained a defense investigator would be speaking with her, and told her to tell them he had permission to drive the Jeep. Ex. 1A at 6:48.

The State charged Mr. Gonzalez with theft of a motor vehicle, unlawful possession of a controlled substance, failure to comply with his duty upon striking an unattended vehicle, and tampering with a witness. CP 5-6. At trial, the State alleged Mr. Gonzalez had unlawfully possessed methamphetamine, rather than cocaine, but the identity of the substance was not provided in the to-convict instruction. CP 32. The jury did not reach a verdict on the theft charge or the failure to comply with his duty upon striking an unattended vehicle. CP 44, 46. It found him guilty of possession of a controlled substance and tampering with a witness. CP 45, 47. The trial court sentenced him to 18 months on the possession charge, to run concurrent with 51 months on the tampering charge. CP 61.

D. ARGUMENT

1. Mr. Gonzalez's conviction for tampering with a witness violates due process because there is insufficient evidence for a rational trier of fact to find the elements beyond a reasonable doubt.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

When the sufficiency of the evidence is challenged, the Court may affirm only if, after viewing the evidence most favorable to the State, the Court can conclude a rational trier of fact could have found the element beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

a. The State did not show Mr. Gonzalez attempted to induce Ms. Hook to testify falsely.

The State charged Mr. Gonzalez with tampering with a witness based on his recorded telephone conversation with Ms. Hook. CP 6; RP 214. An individual is guilty of tampering with a witness when, in relevant part:

> he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
>
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony.

RCW 9A.72.120(1)(a). During the telephone call Mr. Gonzalez implored Ms. Hook to tell a defense investigator something different from the information that was initially provided to the police. However, the evidence at trial did not show he attempted to induce her to testify falsely.

When he called from the jail Mr. Gonzalez informed Ms. Hook that a defense investigator was trying to reach her and said, "you tell them that you gave me permission." Ex. 1A at 6:48. Ms. Hook responded that was going to be hard for her to do. Ex. 1A at 7:13. By way of explanation, she said, "for one thing, you already know what the

deal was." Ex. 1A at 7:24. Both then agreed "not to talk about all that." Ex. 1A at 7:29. Mr. Gonzalez then said, "you know what to do, though." Ex. 1A at 7:35. Ms. Hook responded by asking when she could come visit him, so they could talk in person. Ex. 1A at 7:38.

Later in the conversation, Ms. Hook said the worst thing about the incident "is being away from one another." Ex. 1A at 10:04. Mr. Gonzalez responded, "what if they gave me six years?" Ex. 1A at 10:15. Ms. Hook said she could not bear to think about that. Ex. 1A at 10:20. Mr. Gonzalez asked her, "what would you rather deal with, 15 years or six years? What would you rather take – six or 15?" Ex. 1A at 10:30. Ms. Hook responded, "six." Ex. 1A at 10:44. The two then discussed whether Ms. Hook would be willing to marry Mr. Gonzalez if he was incarcerated for six years, and Ms. Hook expressed how heart-breaking it would be to marry him and leave him in prison. Ex. 1A at 10:49.

Criminal statutes must be narrowly construed. *State v. Pella*, 25 Wn. App. 795, 797, 612 P.2d 8 (1980). When evaluating the sufficiency of the evidence for a witness tampering charge, this Court is required to "resolve all doubts against including borderline conduct." *Id.* In *Pella*, the Court applied this principle to find insufficient

evidence where the defendant threatened the witness before the information had been filed, and therefore before an "official proceeding" was pending. *Id.*; RCW 9A.72.120. Similarly, here, Mr. Gonzalez did not discuss Ms. Hook's testimony at trial. He simply asked Ms. Hook to speak with his investigator. For this reason, the evidence does not show he was attempting to induce a witness to "testify" as to specific information.

In addition, the evidence does not show Mr. Gonzalez was asking Ms. Hook to testify *falsely*. When Ms. Hook took the stand at trial, she testified Mr. Gonzalez did not have permission to drive her mother's vehicle. RP 180. However, she admitted that despite her mother's wishes, she had allowed Mr. Gonzalez to use the Jeep in the past without her mother's knowledge. RP 231-32. When the deputy prosecuting attorney asked Ms. Hook why she told Mr. Gonzalez it would be "hard" for her to say that she had given him permission to drive the Jeep, Ms. Hook did not respond that such a statement would be a lie. RP 215. Instead, she explained:

> What – what I meant was it would be hard for me to say that I had given him permission. I mean, after we called the police and all of that, I can't go back and then say I gave you permission. I would look like a dumbass.

RP 215.

The evidence demonstrated Ms. Hook was concerned about how she would appear to others, including her mother, but not that Mr. Gonzalez had encouraged her to be untruthful. RP 215-16. Indeed, the State was unable to convince the jury to convict Mr. Gonzalez of theft of the motor vehicle, indicating that not all of the jurors believed Ms. Hook was testifying truthfully when she claimed Mr. Gonzalez did not have permission to drive her mother's Jeep. CP 44.

When evaluating the sufficiency of the evidence for the charge of witness tampering, this Court examines both the meaning of the words used by the individual and the context in which the words were used. *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990). Where the literal words do not contain a request to withhold testimony, an express threat, or a promise of any reward, and the context does not allow for such an inference, reversal is required. *Id.* at 84.

In *Rempel*, the defendant instructed the witness to drop the charges and that if she did not, his life would be ruined. 114 Wn.2d at 83. Because the defendant did not actually request the witness withhold her testimony, the Court reversed. *Id.* at 85; *cf. State v. Williamson*, 131 Wn. App. 1, 6, 86 P.3d 1221 (2005) (sufficient

evidence where defendant specifically asked the witness to take back her statement).

Similar to *Rempel*, Mr. Gonzalez did not ask Ms. Hook to withhold testimony, threaten Ms. Hook, or offer her something in exchange for her testimony. Instead, he asked her to tell his investigator that she had given him permission to use her mother's car. Ex. 1A at 6:48. These statements were criminal only if he was asking Ms. Hook to testify falsely, which the evidence at trial did not support. Ms. Hook testified she refused his request because she did not wish to look dumb, rather than because it was actually untruthful. RP 215. Ms. Hook had given Mr. Gonzalez permission to drive the car in the past and it was Ms. Hook's mother, rather than Ms. Hook, who was upset when the car was missing. RP 180, 190. In light of this evidence, Mr. Gonzalez's plea to Ms. Hook that she knew "what to do," suggested that he was asking Ms. Hook to tell the truth, rather than lie for him. Ex. 1A at 7:35.

b. Mr. Gonzalez's conviction for tampering with a witness must be reversed.

If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. *Green*, 94 Wn.2d at 221; *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial

following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) ("[t]he double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence") (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)). Because the State failed to prove Mr. Gonzalez committed the crime of tampering with a witness his conviction must be reversed.

2. The to-convict instruction erroneously omitted the identity of the controlled substance, requiring reversal of the possession charge.

a. <u>The to-convict instruction omitted the identity of the controlled substance, which was an essential element of the charged crime.</u>

All essential elements of the crime charged must be included in the to-convict instruction. *State v. Clark-El*, __ Wn. App. __, 2016 WL 6601572 at *1 (No. 73523-3-I, November 7, 2016) (citing *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). The identity of a controlled

substance is an essential element of the crime when it increases the statutory maximum sentence the defendant faces if convicted. *Clark-El*, __ Wn. App. __, 2016 WL 6601572 at *1 (citing *State v. Goodman*, 150 Wn.2d 774, 778, 83 P.3d 410 (2004); *State v. Sibert*, 168 Wn.2d 306, 311-12, 230 P.3d 142 (2010)).

Mr. Gonzalez was charged with possession of methamphetamine. CP 5. However, the to-convict instruction did not specify that the jury needed to find that he had possessed methamphetamine. CP 32. Instead, the court instructed the jury as follows:

> To convict the defendant of the crime of possession of a controlled substance, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 21st day of September, 2015, the defendant possessed a controlled substance; and
>
> (2) That this act occurred in the State of Washington.

CP 32.

Based on the jury's verdict finding Mr. Gonzalez guilty of the unlawful possession of "a Controlled Substance as charged in Count II," the court imposed sentencing for possession of methamphetamine,

which is a Class C felony. CP 58. Mr. Gonzalez was sentenced to 18 months for this conviction. CP 61.

The imposition of this sentence was error because an individual may possess a controlled substance, such as marijuana, and be guilty of only a misdemeanor, or no crime at all. RCW 69.50.4014; RCW 69.50.360. Mr. Gonzalez was prosecuted under RCW 69.50.4013, which directs that any possession of a controlled substance not obtained pursuant to a prescription is a Class C felony. RCW 69.50.345(1), (2). However, the statute makes an exception for the possession of forty grams or less of marijuana, which is only a misdemeanor under RCW 69.50.4014. RCW 69.50.4013(2). It makes an additional exception for the possession of very small amounts of marijuana under RCW 69.50.360. RCW 69.50.4013(3)(a). For example, possession of one ounce of useable marijuana is not a criminal or civil offense under Washington state law. RCW 69.50.360.

Because of these exceptions to RCW 69.50.4013, the identity of the controlled substance determined whether the possession was a crime, and if so, the level of crime and penalty. It was therefore an essential element. *Clark-El*, __ Wn. App. __, 2016 WL 6601572 at *1; *Goodman*, 150 Wn.2d at 785-86. In order for Mr. Gonzalez to be

guilty of a felony, the jury was required to find he possessed methamphetamine.

b. The to-convict instruction did not contain all essential elements simply because it referenced "Count II."

It is critical the to-convict instruction contain all of the elements of the crime "because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). This Court will not look to other jury instructions in order to supply the missing elements in a to-convict instruction. *Sibert*, 168 Wn.2d at 311. Here, the to-convict instruction simply stated that in order to "convict the defendant of the crime of possession of a controlled substance, as charged in Count II" it must find the "defendant possessed a controlled substance." CP 32.

In *Sibert*, a four-justice plurality found no error where the to-convict instruction did not identify the controlled substance as methamphetamine, but instead informed the jury the controlled substance was "as charged" and the information referenced methamphetamine. 168 Wn.2d at 312. However, as this Court recognized in *Clark-El*, "a plurality opinion 'has limited precedential value and is not binding on the courts.'" __ Wn. App. __, 2016 WL

6601572 at *2 (quoting *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004)). Finding it impossible to "assess the correct holding of an opinion signed by four justices" this Court relied on our supreme court's prior decisions to find simply "that it is error to give a to-convict instruction that does not contain all elements essential to the conviction." __ Wn. App. __, 2016 WL 6601572 at *2 (citing *Smith*, 131 Wn.2d at 263; *Emmanuel*, 42 Wn.2d at 819; *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005)).

Such reasoning is sound. Just as the Court will not look to other jury instructions, it should not look to the information to supply the missing element. *See Sibert*, 168 Wn.2d at 319 (the plurality's conclusion is "inexplicable because the 'to convict' instructions did not specify the controlled substance Sibert allegedly delivered and possessed with intent to deliver") (Alexander, J., dissenting). Indeed, unlike the other jury instructions, the information is not provided to the jury and the jury is unable to refer to it during deliberations. Supp. CP 72 (Exhibit Record).

In addition, the "as charged" language does not actually require the jury to find the defendant possessed methamphetamine. The instruction only requires the jury to find the defendant possessed "a"

controlled substance in order to find the defendant possessed the controlled substance "as charged." CP 32. Directing the jury to find "a" controlled substance does not require the jury to find the substance identified in the information, even if the jury had the ability to refer to the information during deliberations.

The to-convict instruction does not contain all of the elements essential to the conviction. This Court should hold the omission of this element in the to-convict instruction was error. *Clark-El*, __ Wn. App. __, 2016 WL 6601572 at *2.

c. Under the Washington Constitution, omission of an essential element from a "to convict" instruction is never harmless.

Article I, sections 21 and 22 of the Washington Constitution mandate reversal whenever an element is omitted from a "to convict" instruction. Under our state constitution, the "right of trial by jury shall remain inviolate . . . ." Const. art. I, § 21. It also provides that criminal defendants have a right to an "impartial jury. Const. art. I. § 22. The term "inviolate" in article I, § 22, "connotes [meaning] deserving of the highest protection" and, to remain true to this meaning, "must not diminish over time and must be protected from all assaults to its essential guarantees." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

In 1999, the United States Supreme Court held that a jury instruction that omits an element of offense is subject to harmless error analysis. *Neder*, 527 U.S. at 9-10. In 2002, the Washington Supreme Court found "no compelling reason" to not to follow *Neder*'s holding. *Brown*, 147 Wn.2d at 340. The Court did not discuss whether this holding was consistent with the jury trial guarantee under the Washington Constitution.

It is "well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution." *State v. Simpson*, 95 Wn.2d 170, 177, 622 P.2d 1199 (1980). Doing so "is particularly appropriate when the language of the state provision differs from the federal, and the legislative history of the state constitution reveals that this difference was intended by the framers." *Id.*

Our Supreme Court articulated standards to decide when and how Washington's constitution provides different protection of rights than the United States Constitution in *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986). The court examines six nonexclusive criteria: (1) the text of the state constitutional provision, (2) the differences in the

texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. *Gunwall*, 106 Wn.2d at 61-62. However, when it has already been determined that our state constitution provides greater protection than the federal constitution, no *Gunwall* analysis is required for the court to apply the state constitution. *State v. Williams-Walker*, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010).

The Washington Supreme Court has already determined that the right to trial by jury under our state Constitution provides greater protection than under the United States Constitution. *Id.* at 895-96; *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008); *State v. Smith*, 150 Wn.2d 135, 156, 75 P.3d 934 (2003) ("*Gunwall* analysis indicates that the Washington Constitution generally offers broader protection of the jury trial right than does the federal constitution."); *City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982) ("the right to trial by jury which was kept 'inviolate' by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789."). Thus, the question is the

scope of that right, not whether the provision mandates greater protection. *See Smith*, 150 Wn.2d at 151.

To determine the scope of the jury trial right under the Washington Constitution, examination of Washington law as it existed at the time of the adoption of our constitution is appropriate. *Smith*, 150 Wn.2d at 153. In 1890, during our first year of statehood, the Supreme Court held that the omission of an element from what we would now call the "to convict" instruction required reversal. *McClaine v. Territory*, 1 Wash. 345, 25 P. 453 (1890). The court reasoned that the omission of an element from the "to convict" instruction required reversal, regardless of how much evidence was presented on that element or whether the outcome would have been the same with the proper instruction. *Id.* at 354-55.

Consistent with this understanding, Washington precedent recognized that the failure to instruct on an element of an offense requires automatic reversal. *Smith*, 131 Wn.2d at 265 (recognizing prior cases holding that "failure to instruct on an element of an offense is automatic reversible error"); *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996) ("By omitting an element of the crime of assault, the trial court here committed an error of constitutional magnitude.");

State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995) ("The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. It is reversible error to instruct the jury in a manner that would relieve the State of this burden.") (citations omitted); *State v. Pope*, 100 Wn. App. 624, 630, 999 P.2d 51 (2000) ("A harmless error analysis is never applicable to the omission of an essential element of the crime in the 'to convict' instruction. Reversal is required."). To conclude otherwise would be "'equivalent to directing the jury that it is not necessary for the state to prove any elements of the offense except those included in the definition given by the court.'" *Emmanuel*, 42 Wn.2d at 821(quoting *Croft v. State*, 117 Fla. 832, 158 So. 454, 455 (1935)). Thus, the history and prior interpretation of the state constitutional right to a jury trial supports adoption of the automatic reversal rule.

Other states have rejected *Neder* under their state constitutions. One state is New Hampshire. *State v. Kousounadis*, 159 N.H. 413, 429, 986 A.2d 603, 616 (2009). In doing so, the New Hampshire Supreme Court explained that *Neder* had been "widely criticized" and noted the reasoning of one commentator in rejecting the rule:

> Harmless error analysis depends upon the existence of a verdict of guilty beyond a reasonable doubt on the

> elements of the crime. The appellate court must assess the possibility that the error affected the jury's verdict. If there is no verdict on an element of the crime, it is not possible to conclude that the error did not affect the verdict.

Id. at 616 (quoting Linda E. Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in Neder v. United States*, 28 Am. J. Crim. L. 229, 232 (2001)). The court also found Justice Scalia's dissent in *Neder* persuasive on the logic of the jury trial right and what it requires. *Id.* As Justice Scalia explained, "Harmless-error review applies only when the jury *actually renders* a verdict—that is, when it has found the defendant guilty of all the elements of the crime." *Neder*, 527 U.S. at 38 (Scalia, J., dissenting).

Mississippi reached the same result under its state constitution and overruled prior precedent that had relied on *Neder*. *Harrell v. State*, 134 So. 3d 266, 275 (Miss. 2014). The court emphasized the strong language used in its state constitution, which states the "'right of trial by jury *shall remain inviolate*.'" *Id.* at 271 (Miss. 2014) (quoting Miss. Const. art. 3, § 31). The court also explained that the "idea that an accused's right to a trial by jury is less than absolute is relatively new" and that decisions prior to *Neder* recognized that a harmless error

analysis was inappropriate when a jury fails to decide an essential element. *Id.*; *see e.g., Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) ("to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee."). Like the New Hampshire Supreme Court, the court also found Justice Scalia's dissent in *Neder* persuasive, which recognized the historical importance of the jury trial right to American democracy. *Harrell*, 134 So. 3d at 274. The court concluded that given the "stronger wording" of its state constitution and the "strong historical precedent that directs against . . . allowing judges—rather than juries—to determine guilt under the rubric of harmless error," automatic reversal is required when the jury is not instructed as to an element of the charged crime. *Id.* at 271. To allow otherwise "impairs, infringes upon, violates, and renders broken the right to a jury trial." *Id.* at 274.

This Court should follow New Hampshire's and Mississippi's lead. Historical precedent favors rejecting the *Neder* rule. And, as in Mississippi's constitution, the right to trial by jury in Washington's constitution is "inviolate." As Justice Sanders recognized in *Sibert*, the rule requiring automatic reversal is consistent with this language:

> Automatic reversal is consistent with our state constitution's command that the right to a jury trial remain inviolate. *See* Const. art. I, § 21. As the dissent by Alexander, J., at 150-51, points out, we have previously relied on *Webster's Dictionary* when interpreting "inviolate": "'free from change or blemish: PURE, UNBROKEN . . . free from assault or trespass: UNTOUCHES, INTACE.'" *Smith,* 150 Wash.2d at 150, 75 P.3d 934 (alteration in original) (quoting Webster's Third New International Dictionary 1190 (1993)). Anything less cannot be said to leave our jury trial right "free from blemish," "unbroken," and "intact."

Sibert, 168 Wn.2d at 330-31 (Sanders, J., dissenting).

Because the "to convict" instruction in this case omitted an essential element and this kind of error is never harmless, this Court should reverse Mr. Gonzalez's conviction.

d. Reversal of Mr. Gonzalez's sentence is required under *Clark-El.*

Even if this Court determines the trial court's error is subject to a harmless error analysis and reversal of the conviction is not required, Mr. Gonzalez's case must be remanded for resentencing. "The constitutional right to jury trial requires that a sentence must be authorized by a jury's verdict." *Clark-El*, __ Wn. App. __, 2016 WL 6601572 at *5 (quoting *State v. Morales*, __ Wn. App. __, 2016 WL 5373313 at *1 (No. 72913-6-I, September 26, 2016)). Although Division I found the erroneous omission of an essential element in the

to-convict instruction subject to harmless error, it reversed Mr. Clark-El's sentence because "[t]he jury's finding that Clark-El delivered an unidentified 'controlled substance' authorized the court to impose only the lowest possible sentence for delivery of a controlled substance." *Clark-El*, _ Wn. App. __, 2016 WL 6601572 at *5.

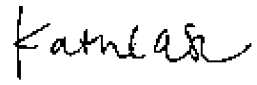
Under *Clark-El*, Mr. Gonzalez's sentence must be reversed because the jury's verdict did not specify the controlled substance it determined Mr. Gonzalez had unlawfully possessed. CP 45. In the absence of the identification of the substance, the verdict only authorized the trial court to impose the lowest possible sentence for possession of a controlled substance, which is a misdemeanor. RCW 69.50.4014. This Court must remand for resentencing. *Clark-El*, __ Wn. App. __, 2016 WL 6601572 at *5.

E. CONCLUSION

This Court should reverse Mr. Gonzalez's conviction for tampering with a witness because the State failed to present sufficient evidence for this charge. This Court should reverse Mr. Gonzalez's conviction for possession of a controlled substance, or in the alternative, remand for sentencing, because the to-convict instructions omitted an essential element of crime.

DATED this 22nd day of November, 2016.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

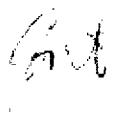
STATE OF WASHINGTON, Respondent, v. LEONEL GONZALEZ, Appellant.	)))))))))	NO. 48850-7-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF NOVEMBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MICHELLE HYER, DPA [PCpatcecf@co.pierce.wa.us] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA COA PORTAL
[X] LEONEL GONZALEZ 883621 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF NOVEMBER, 2016.



X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
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WASHINGTON APPELLATE PROJECT

November 22, 2016 - 4:19 PM

Transmittal Letter

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Case Name: STATE V. LEONEL GONZALEZ
Court of Appeals Case Number: 48850-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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